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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ANTHONY J. DeCINTIO, PETER A. PIAZZA, MICHAEL A. GARAYUA, JOSE P. GOMES, ANGEL A. GARAYUA, WINSTON P. DAVID and DANIEL SAMUELS,

Petitioners,

vs.

WESTCHESTER COUNTY MEDICAL CENTER; COUNTY OF WESTCHESTER,

Respondents.

BRIEF OF RESPONDENTS WESTCHESTER COUNTY MEDICAL CENTER AND COUNTY OF WESTCHESTER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Do male petitioners, who were subjected neither to sexual harassment or circumstances different from similarly situated women, have a claim for a violation of the sex discrimination provisions of Title VII of the Civil Rights Act of 1964, when an individual woman, with a recognized superior professional credential, is claimed to have been hired to a newly created position due to a voluntary romantic engagement with a middle-level supervisor, where top-level management established the requirement for the position and made the hiring decision for non-discriminatory reasons unaware of any motive of that supervisor?

2. Do male Staff Respiratory Therapists at a hospital, have a claim for violation of the Equal Pay Act,

when the hospital employer creates for non-discriminatory reasons not involving gender, a new higher-paying respiratory therapy position in a newly-opened Intensive Care Unit for critically ill newborns, and hires a woman with superior skills for that position who possesses a recognized superior professional credential, which the Staff Therapists do not possess, and which commands a higher salary in the marketplace?

3. Whether the District Court's findings were clearly erroneous that petitioners were qualified to provide respiratory therapy services in the Neonatal Intensive Care Unit of Westchester County Medical Center, had performed equal work under similar working conditions requiring equal skill, effort and responsibility, and that there existed a romantic

relationship between John Ryan and Jean Guagenti at the time of hire?

4. Assuming the correctness of the District Court findings, whether an employer under the Equal Pay Act and Title VII of the Civil Rights Act of 1964 is liable when a middle-level supervisor arranges for the hiring of an employee with whom he is romantically engaged where the top-level management is unaware of the motive of the supervisor and acts for non-discriminatory reasons?

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CITATIONS OF OPINIONS BELOW

Respondents accept the Petition's citation of the opinions below except that certain findings made by the District Court, referred to by number in the District Courts findings [Pet. App. B, pp. A 27-29], are not included in Petitioners' Appendix. These additional findings, other than stipulated facts, are reproduced in Appendix A to this Brief.

STATEMENT OF THE CASE

In April of 1982, Westchester County Medical Center ("WCMC") opened a regional Neonatal Intensive Care Unit ("Neonatal ICU") for the treatment of critically ill newborns.

WCMC decided to add to the Neonatal ICU an Assistant Chief of Respiratory Therapy position at a higher salary than staff respiratory therapists. Specifications for the new position included a "special requirement" that the applicant be registered with the National Board of Respiratory Therapists ("NBRT").*

On April 26, 1982, Jean Guagenti,

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*Registration by the NBRT is a credential which may be obtained by a respiratory therapy practitioner, and requires successful performance of an examination administered by that Board together with previous experience as a respiratory therapy care practitioner. 807 F.2d at 305, n.1.

a female respiratory therapist registered by the NBRT, was hired for the new position by the Westchester County Commissioner of Hospitals on the recommendation of John Ryan, the Program Administrator of the Respiratory Therapy Department.*

Male petitioners, none of whom were then registered by the NBRT, filed complaints with the EEOC and New York State Division on Human Rights charging sex discrimination, which complaints were dismissed based on a lack of credible evidence that the NBRT registry requirement was pretextual.

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*The statement at page 3 of the Petition that Ryan made the decision to adopt the NBRT registration requirement and to hire Guagenti is not completely accurate. Ryan, according to the District Court, originated the idea for registration (Pet. App. B pp. A16, 23) and recommended hiring Guagenti to the Commissioner of Hospitals.

Thereafter, petitioners commenced this action in the District Court alleging that they had been disqualified from promotion due to a sexual relationship between Ryan and Guagenti, in violation of the Civil Rights Act of 1964, 42 U.S.C. §2000-e(2) and the Equal Pay Act, 29 U.S.C. §206(d)(1). None of the female Staff Respiratory Therapists were parties to the suit.

After a bench trial, the District Court held that the provisions of both Title VII and the Equal Pay Act were violated, finding that a romantic relationship existed between Ryan and Guagenti when she was hired, that the registration requirement for the Assistant Chief position was a pretext by Ryan to secure the position for Guagenti, and that Petitioners performed substantially the same work

as Guagenti. The Court awarded $19,374.30 in total to Petitioners and $43,513.00 in legal fees.

The District Court also concluded that top administrators of WCMC were unaware of Ryan's motive, which related only to him, and had non-discriminatory reasons for their actions, to wit: to upgrade the therapist assigned to the Neonatal ICU, and, in addition, to begin a process to upgrade the entire Respiratory Therapy Department. Pet. App. B. p.A29, Res. App. A, p.A3.

The Court of Appeals for the Second Circuit reversed. 807 F.2d 304 (2d Cir. 1986). The Court of Appeals concluded that discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964 or the Equal Pay Act, did not encompass disparate treatment premised not upon one's

gender, but upon a voluntary romantic relationship between the employer and the person preferentially hired.

In so reversing, the Second Circuit did not embrace the District Court's findings, but assumed for purposes of its opinion the correctness of the District Court's findings.* 807 F.2d 308.

On March 9, 1987, Petitioners' petition for rehearing with a suggestion for re-hearing in banc, was denied.

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*The statements made in the petition at pages 9 and 11 that the Court of Appeals left the District Court's findings "undisturbed" is an incomplete explanation of the Court of Appeals' treatment of those findings.

SUMMARY OF ARGUMENT

This case is not of special importance and the Court of Appeals' decision conflicts neither with decisions of this Court nor other Circuits. Moreover, this case is encumbered with serious, multiple, and unsettled factual issues as underscored by the Second Circuit's refusal to embrace as its own the District Court findings.

Unraised below, Petitioners may not argue a hybrid species of sexual harassment in this Court. Petitioners' contentions with respect to the gender-based purview of the sex discrimination provisions of Title VII and the Equal Pay Act, are best addressed to Congress.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

A. The Petition does not present special or important reasons warranting review.

Petitioners assert that the Court of Appeals for the Second Circuit erroneously applied the sex discrimination provisions of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act.

This Court, however, has never regarded its function as merely to correct a legal error perceived by a disappointed litigant in a lower Court decision. To the extent Petitioners seek clarification or a change of federal statutory law, that role is best left to Congress.

As recognized by the Second Circuit's opinion, Petitioners here asserted non-gender-based claims which

are beyond the purview of Title VII and the Equal Pay Act. 807 F.2d at 306, 308. The Court drew upon opinions of this Court in Meritor Savings Bank, FSB v. Vinson, 106 S.Ct. 2399 (1986), Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702, 707, n.13 (1978), Trans World Airlines v. Hardison, 432 U.S. 63 (1977) and Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) in support of its analysis.

Nor do the regulations of federal agencies administering the Equal Pay Act and Title VII support Petitioners' claims. 29 C.F.R. Part 800 et seq.; 29 C.F.R. §1604.11(g). Petitioners were not discriminated against on the basis of their gender. 807 F.2d at 308.

Contrary to Petitioners' contention that the Court erroneously applied Title VII analysis to the

Equal Pay Act, the Court below found that the case was not gender-based and it is gender-based wage differentials for equal work that is the subject of the Equal Pay Act. The Act proscribes wage discrimination "on the basis of sex" and excludes differences based "on any other factor other than sex." 29 U.S.C. §206(d)(1)(iv).

Petitioners' analysis is also inconsistent. When it suits their purposes, Petitioners invoke a pretext argument borrowed from their Title VII claim to overcome the non-gender-based, non-discriminatory reasons for the creation of the disputed job position. Petition pp. 9, 10.

B. There is no conflict between the Court of Appeals decision below and decisions of this Court

Contrary to Petitioners' suggestions, there is no conflict

between the decision of the Court of Appeals for the Second Circuit and decisions of this Court in County of Washington v. Gunther, 452 U.S. 161 (1981) and Corning Glass Works v. Brennan, 417 U.S. 188 (1974); each involved gender-based claims of discrimination in wages not presented here.

Nor is there any conflict between the lower Court's disposition and Meritor Savings Bank, FSB v. Vinson, 106 S.Ct. 2399 (1986) which recognized certain forms of sexual harassment claims under Title VII, not relevant here.

C. No sexual harassment claim was raised by Petitioners.

Petitioners were not subjected to sexual advances (807 F.2d at 308) and made no "hostile environment" claim below. No mention of sexual

harassment in any form appears in either the District Court or Court of Appeals' decisions. Rather, Petitioners claimed that a supervisor displayed favoritism toward an individual woman with whom he had a voluntary romantic-engagement.

As stated by the Second Circuit: "Guagenti's special relationship to Ryan" was the gravamen of Petitioners' claim. "That relationship forms the basis of appellee's sex discrimination claims." 807 F.2d at 308.

After the Second Circuit rendered its opinion, Petitioners in a motion for rehearing belatedly attempted to introduce a hybrid species of a hostile environment theory. Beyond untimeliness, the new theory disregards that sexual harassment is based on unwelcome sexual conduct. 29 C.F.R. §1604.11(a)(1986).

D. There is no conflict among the Circuits

There is no conflict among the Circuits on the Equal Pay Act issue Petitioners seek to raise.*

Petitioners cite the Title VII decision of the District of Columbia Court of Appeals in King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985) to show a Title VII conflict among the Circuits, justifying a grant of a writ of certiorari. The conflict is illusory.

After King v. Palmer was decided

*The Circuits generally construe Title VII and the Equal Pay Act harmoniously. Orahood v. Board of Trustees of the University of Arkansas, 645 F.2d 651, 654 (8th Cir. 1981); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 446 (D.C. Cir. 1976) cert denied 434 U.S. 1086 (1978); Orr v. MacNeill and Sons, Inc., 511 F.2d 166, 170 (5th Cir. 1975) cert denied 423 U.S. 865 (1975); Ammons v. Zia, 448 F.2d 117, 119 (10th Cir. 1971); Shultz v. Weaton Glass Company, 421 F.2d 259, 266 (3d Cir. 1970) cert denied 398 U.S. 905 (1970).

by a three-judge panel, six other judges of that Court, denying a suggestion for a rehearing in banc and a motion by the United States regarding the filing of an amicus brief, emphasized that the applicability of Title VII to the facts before that Court had never been raised and therefore was not properly the subject of a rehearing in banc. 778 F.2d at 883.*

*The EEOC decision in United States Postal Service, Reg. No. 05830088 cited by Petitioner (Petition p. 21) is distinguishable in several respects from the case at bar. Like King v. Palmer, it is premised on an existing employer-employee relationship, not present here at time of hire with respect to Guagenti. Further, in United States Postal Service, there were requests for sexual favors or sexual advances. At bar, there was no showing of such requests or advances initiated by Ryan, nor "submission" to such requests or advances by Guagenti.

As a result, it is apparent that King v. Palmer is not even precedent within the D.C. Circuit, and, if a comparable case arises, that Circuit must treat the issue as if presented for the first time.

In any event, King v. Palmer involved a hostile environment claim not presented here. 778 F.2d at 880, 883.

E. This case is encumbered by serious factual issues.

In order to address any issues of the case, the Court would be drawn into unsettled and multiple factual issues.

In its opinion below, the Second Circuit declined to embrace as its own the District Court's findings of fact, prefacing its rendition of facts with "[e]ven assuming the appellees' allegations are true and the district court's findings are correct,

appellees have not set forth a cognizable Title VII claim for sex discrimination." 807 F.2d at 308.

Concluding its opinion, the Second Circuit again noted that "[b]ecause that determination is dispositive of this appeal, we need not address the other issues raised by appellants." 807 F.2d at 308. These other issues included arguments that the District Court's findings were clearly erroneous.

The District Court findings are inconsistent with the findings made by the EEOC and the New York State Division on Human Rights, which agencies dismissed Petitioners' administrative complaints for lack of credible evidence, prior to District Court proceedings. 807 F.2d at 306.

Insofar as the proof of a sexual relationship is concerned, neither John Ryan nor Jean Guagenti was called as a witness at trial. The finding by the District Court is based on conjectural evidence of interest and flirtation between the two after Jean Guagenti was hired and during a previous period of employment.*

The testimony of Dr. Harry Dweck, Chief of the Division of Neonatal Perinatal Medicine at New York Medical College and Director of the WCMC Neonatal ICU, highlights the sharp factual issues regarding Petitioners' claimed qualifications and performance of equal work.

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*Evidence that Ryan and Guagenti began living together some months after she was hired and later planned to marry, is not dispositive of whether a relationship existed at time of hire, nor proves the sexual nature of the relationship at that time.

Although Dr. Dweck's testimony was cited favorably by the District Court (Pet. App. B, pp. A24, 25, 26, 28, 33), the District Court's findings are contrary to Dweck's testimony.

Dr. Dweck testified that the Staff Respiratory Therapists were not fully competent to provide services to critically ill newborns; some actually refused to respond to pages from the Neonatal ICU for this stated reason; when they came, they set up respirators, but did not know how to run them for newborns; unlike Petitioners, Jean Guagenti was capable of providing the necessary services to newborns; to reach the necessary degree of competence, weeks of training would be necessary for the Staff Therapists.

Relevant excerpts of Dr. Dweck's testimony are included in Appendix B to this brief (A4-14).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 1, 1987

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ANTHONY J. DE CINTIO,
PETER A. PIAZZA,
MICHAEL A. GARAYUA,
JOSE P. GOMES,
ANGEL A. GARAYUA,
WINSTON P. DAVID,
DANIEL A. SAMUELS,

DEFENDANTS PRE-TRIAL STATEMENT

Plaintiff,

- against -

WESTCHESTER COUNTY MEDICAL CENTER;
COUNTY OF WESTCHESTER,

Defendants.
----------x

A. STIPULATED FACTS:

1. Annexed is a copy of "Stipulated Facts" submitted to the Court under separate cover.

B. REQUEST FOR FINDINGS OF FACT:

1. The National Board for Respiratory Care ("NBRC") administers two examination systems for respiratory care practitioners; The Certification Examination for Entry

Level Respiratory Therapy Practitioners and the two-part Registry Examination for Respiratory Therapist.

2. The Certification Examination for Entry Level Respiratory Therapy Practitioners is designed to test the knowledge and skills required for all Respiratory Therapy personnel upon entry into the profession.

3. Omitted - not found by District Court.

4. In April, 1982, the "Special Requirement" for the existing title of Assistant Chief Respiratory Therapist (Assistant Chief) was revised to require registration by the National Board of Respiratory Therapy (NBRT)

5. In April, 1982, the title of Assistant Chief, as revised April 1, 1982, was allocated to staff the Perinatal Unit.

6. In April, 1982, none of the Plaintiffs could meet the "Special Requirement".

7. Omitted, not found by District Court.

8. The revision was motivated by two non-discriminatory purposes, i.e., to upgrade the position allocated to staff the Perinatal Unit and, by creating a Registered Respiratory Therapist position, and eventually raise the competency of the entire Respiratory Therapy Department.

9. Omitted, not found by District Court.

APPENDIX B

HARRY DWECK,

called as a witness by the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. MC CARTHY:

Q. Dr. Dweck would what is your speciality?

A. Neonatology, pediatrician.

Q. Are you board certified?

A. Yes in pediatrics and the subspecialty of neonatology by the American Board of Pediatrics.

Q. When did you become affiliated with the Westchester County Medical Center?

A. I believe it was some time around 1979.

Q. Are you employed by the Center?

A. Yes.

Q. Are you also affiliated with the New York Medical School?

A. Yes, I am a faculty member full-time there.

(Joint Appendix in Court of Appeals, page 388a).

. . .

Q. Were you familiar with the respiratory therapists, the staff respiratory therapists on the staff in March, February and March 1982?

A. Yes, several of them.

Q. Had you reached a determination in your opinion as to whether or not any of them were competent to work with neonates at that time?

A. At March of 82, absolutely.

Q. What was your determination?

A. None of them were fully competent in caring for new-borns in any way, shape or form.

Q. With whom did you discuss your opinion?

A. It was on multiple levels but primarily with the administrators of the hospital.

A. Are you familiar with Mr. Armet?

A. Very much so.

Q. Did you express that opinion to Mr. Armet?

A. Very clearly.

(Joint Appendix in Court of Appeals pages 390a to 391a).

. . .

CROSS EXAMINATION:
BY MR. SAPIR:

. . .

Q. You are not familiar with the competency or incompetency of the

plaintiffs in this case, are you?

THE COURT: As of 1982 and 1983.

Q. As of 1982.

A. As of 1982, there were numerous occasions when respiratory therapists who were on call were called to the unit, and either refused to come because they said they didn't know anything about new-borns, and they didn't want to go up to the unit, or they came to the unit and were unable to help us.

Q. Isn't it true that your statement that none of the then staff respiratory therapists were competent was based upon experience you had had with certain staff respiratory therapists?

A. I said were not fully competent, No. 1 and No. 2, yes it was based on my experience preceding the opening of

the unit by approximately a year and a half.

(Joint Appendix in Court of Appeals pages 396a to 397a).

. . .

Q. Hadn't there been services given to infants at the medical center before the opening of the neonatology unit?

A. Yes, for a year and a half.

Q. And hadn't respiratory therapists on staff at the hospital provided services?

A. No, not fully by any means.

Q. Not fully?

A. No.

Q. What do you mean by not fully?

A. They directly would bring up the respirator but would do little more than that. Occasionally they would be

setting up the tubing. The respirators were basically run by myself and the nurses and residents.

THE COURT: When you say run, you mean including setting it up and getting it going?

THE WITNESS: Frequently, yes, and that was true for a good deal of the time during the two shifts. I don't know whether this is volunteering or not, but during the two shifts and the weekends when the single respiratory therapist was not on duty.

Q. But were there occasions when staff respiratory therapists were called in to provide those services?

A. By all means, and sometimes they did provide them.

Q. Did you require that those persons be registered therapists? Do you know that I mean by registered?

A. Yes.

Q. Did you require they be registered?

A. Did I require it? That was not under my purview or authority.

THE COURT: Maybe I can cut it short. It's been represented to the court during the time this trial has been dribbling along that Ms. Guagenti ran this service during the daytime up until the time that you ordered her terminated; and that during the other two shifts, persons who were not registered therapists provided whatever services were required in that particular care unit.

Is that a valid statement of fact?

THE WITNESS: No, it is not. They did not provide whatever services were required. They provided some services, and sometimes they provided little or no service, as for example, the times when they refused to come.

THE COURT: Apart from people who refused to come, or let me put it differently: What if anything apart from refusal to come, which ought to be justification for a discharge, what if anything detemined what services the non-registered therapists provided during the time when Ms. Guagenti was not on duty through 1983 or '82, whenever it was that you terminated her?

THE WITNESS: I think it probably would be of value in order to clarify this if I may, to speak of some of the responsibilities of what a respiratory therapist --

THE COURT: I am more concerned with what occurred during the time when --

THE WITNESS: When Ms. Guagenti was not in the unit.

THE COURT: In the beginning period of this service, what if anything was

done by non-registered people?

THE WITNESS: There are two primary functions the respiratory therapists carried out within the unit. One was to set up hoods wherein supplemental oxygen was given to babies who had respiratory distress and required additional oxygen. That was very easy and almost any one of them could have provided that.

But the second was in those babies who were critically ill and who had respiratory failure and stopped breathing or for some reason or other required artifical ventilation. It was in setting up ventilators and in maintaining ventilators where many of them did not know how the respirator fully functioned.

THE COURT: That went on 24 hours a day.

THE WITNESS: That went on on the 16 hours a day when Ms. Guagenti was not there.

THE COURT: Went on all around the clock?

THE WITNESS: The respirators did, yes.

THE COURT: The need to install or set up a respirator?

THE WITNESS: Went on 24 hours a day yes.

THE COURT: I gather when she was not there?

A. The respiratory therapists either frequently delivered the ventilator and then either they with our help set it up ourselves, meaning my component, the physicians in addition to the nurses.

THE COURT: How many times would someone have to do this with your help in order to be able to do it?

THE WITNESS: Very frequently.

THE COURT: A lot?

THE WITNESS: Yes.

THE COURT: How long does it take to learn how to do it?

THE WITNESS: In terms of setting up the ventilator, I think anybody with average intelligence could probably learn it after two or three times being demonstrated as to how to set it up. As to what to do with it once it's set up and to have it function, that takes weeks, in my estimation.

(Joint Appendix in Court of Appeals pages 398a to 402a).

. . .